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PATENT
Attorney Docket No. 502119

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of:

Michael Brinkman et al.

Art Unit: 3632

Application No. 10/743,215

Examiner: Steven M. Marsh

Filed: December 22, 2003

For: LABEL HOLDER FOR A SHELF PRICE
CHANNEL

**TRANSMITTAL OF
APPELLANTS' APPEAL BRIEF**

Mail Stop Appeal Brief – Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

In accordance with 37 CFR 41.37, appellants hereby submit Appellants' Brief on Appeal.

The items checked below are appropriate:

1. Status of Appellants

This application is on behalf of ☐ other than a small entity or ☒ a small entity.

2. Fee for Filing Brief on Appeal

Pursuant to 37 CFR 41.20(2), the fee for filing the Brief on Appeal is for: ☐ other than a small entity or ☒ a small entity.

Brief Fee Due \$250.00

3. Oral Hearing

☐ Appellants request an oral hearing in accordance with 37 CFR 41.47.

A separate paper requesting oral hearing is attached.

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4. Extension of Time

- ☒ Appellants petition for a one-month extension of time under 37 CFR 1.136, the fee for which is \$60.00.
- ☒ Appellants believe that no additional extension of time is required. However, a conditional petition is being made to provide for the possibility that appellants have inadvertently overlooked the need for an additional petition and fee for extension of time.

Extension fee due with this request: \$60.00

5. Total Fee Due

The total fee due is:

Brief on Appeal Fee	\$250.00
Request for Oral Hearing	\$ 0.00
Extension Fee (if any)	\$ 60.00

Total Fee Due: \$310.00

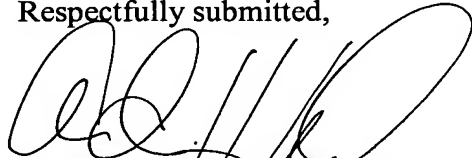
6. Fee Payment

- ☒ Charge Account No. 50-3505 the sum of \$310.00. A duplicate of this transmittal is attached.

7. Fee Deficiency.

- ☒ If any additional fee is required in connection with this communication, charge Account No. 50-3505. A duplicate copy of this transmittal is attached.

Respectfully submitted,



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Date: November 16, 2005

CERTIFICATE OF MAILING

I hereby certify that this APPEAL BRIEF TRANSMITTAL AND APPEAL BRIEF (along with any documents referred to as attached or enclosed) is being deposited with the United States Postal Service on the date shown below with sufficient postage as first class mail in an envelope addressed to: Mail Stop Appeal Brief – Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450

Date: NOV. 16, 2005

A. Locke
A. Locke



PATENT
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APPELLANTS' APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

In support of the Appellant's Notice of Appeal to the Final Office Action dated April 29, 2005, Appellants now submit their Brief.

Real Party In Interest

The Real Party in Interest in this Appeal Brief is the Assignee of the entire interest, Southern Imperial, Inc.

Related Appeals and Interferences

There are no related appeals, interferences or judicial proceedings.

Status of Claims

Claims 1-16 of the application are pending in this application and are reproduced in the attached claims appendix. Of these claims, all claims stand rejected as obvious over the asserted combination of U.S. Patent No. 6,688,567 to Fast et al. in view of U.S. Patent No. 6,708,436 to Nagel. Appellant appeals the rejections of all claims 1-16.

11/22/2005 TBESHAH1 00000028 503505 10743215

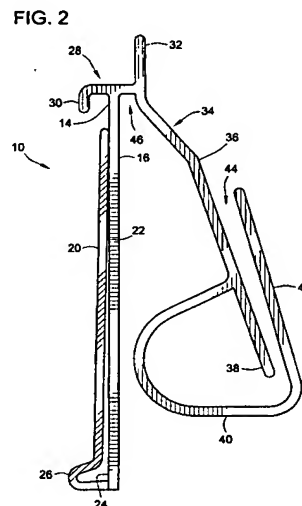
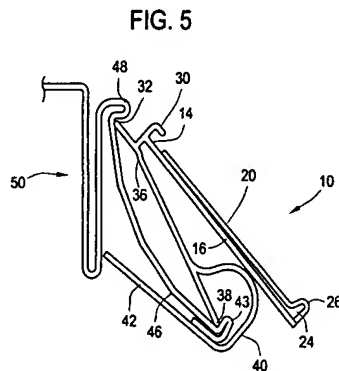
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Status of Amendments

No amendments have been filed subsequent to the final Office Action dated April 29, 2005.

Summary of Claimed Subject Matter

All references below are to the specification and drawings of the present patent application. Some of the references to the specification are to line numbers of the paragraph where indicated, but are otherwise directed toward the line number on the page.¹ For purposes of ready reference in this section, FIGS. 2 (a label holder) and 5 (a label holder and C-channel shelf combination) are reproduced below:



Turning then to the summary of independent claim 1, claim 1 is directed toward a label holder 10 (shown in FIGS. 1-5) intended for attachment to a shelf 50 (shown in FIGS. 3-5). (See page 2, ¶ 11, lns. 1-7; and page 3, ¶ 13, ln. 1). The label holder 10 includes a front panel 20 and a back panel 16. (See FIG. 2, and page 3, lns. 1-2). The back panel 16 is connected to the front panel 20 along a bottom portion 24, and the front panel 20 and the back panel 16 together form a cavity 22 therebetween. (See FIG. 2 and page 3, lns. 1-8). A top flange 28 is provided proximate a top portion (see generally area of reference character 28) of the back panel 16. (See FIG. 2 and page 3, lns. 8-12). A shelf clip portion 34 is joined to the top flange 28 and spaced rearward of the back panel 16. (See FIG. 2 and page 3, lns.

¹ There is no intent to limit the claims in any manner by references, as this is merely being done for compliance with the appeal rules.

11-14). The shelf clip portion 34 comprises an upward retaining flange 32 for engaging the shelf 50 and a downward angle portion 36 which terminates in a catch flange 38. (See FIG. 2 and also 3-5; see also page 3, lns. 12-14). A curved resilient hinge portion 40 extends from the downward angle portion 36 and wraps around the catch flange 38 to form an upward flange 42. (See FIG. 2, and page 3, lns. 15-21).

Turning then to the summary of independent claim 11, claim 11 is directed toward a shelf and label holder combination. Claim 11 recites a label holder 10 (shown in FIGS. 1-5) mounted on a C-channel shelf 50 (shown in FIGS. 3-5). (See page 2, ¶ 11, lns. 1-7; and page 3, ¶ 13, ln. 1). The shelf 50 includes a top support flange 48, an inwardly curving panel 46 and a lower support flange 43. (See FIGS. 3-5; page 3, ¶ 13, ln. 1 – page 4, ln. 9). The label holder 10 includes a front translucent panel 20 and a back panel 16. (See FIG. 2, and page 3, lns. 1-2). The back panel 16 is connected to the front panel 20 along a bottom portion 24 and the front panel 20 and the back panel 16 together form a cavity 22 therebetween. (See FIG. 2 and page 3, lns. 1-8). A shelf clip portion 34 is joined to a top portion of the back panel 16. (See FIG. 2 and page 3, lns. 11-14). The shelf clip portion 34 comprises an upward retaining flange 32 engaging the top support flange 48 of the shelf 50 and a downward angled portion 36 which terminates in a catch flange 38 that is secured by the lower support flange 43 of the shelf 50. (See FIGS. 2 and 5; see also page 3, lns. 12-14, and page 4, lns. 1-9). A curved resilient hinge portion 40 extends from the downward angle portion 36 and wraps around the catch flange 38 to engage a back side of the inwardly curved panel 46. (See FIGS. 2 and 5; and page 3, lns. 15-21, and page 4, lns. 1-9).

Grounds of Rejection to be Reviewed on Appeal

Claims 1-16 stand rejected under 35 USC § 103(a) as being obvious over U.S. Patent No. 6,688,567 to Fast et al. (hereinafter "Fast") in view of U.S. Patent No. 6,708,436 to Nagel (hereinafter "Nagel").

Argument

The sole obviousness rejection that has been advanced cannot be legally supported for any of the following reasons below.

A. The obviousness rejections under 35 USC § 103(a) are based on erroneous factual findings which are evident from the disclosures of the asserted prior art.

In the final Office Action dated April 29, 2005, the Examiner asserted that all of the claims were obvious over Fast in view of Nagel. Fast discloses an extruded plastic label holder that is similar in certain respects to the present invention. However, a notable deficiency is that Fast includes a substantially different mounting means which includes a lower flange 38 (or 38e in Fig. 10²) which is connected along the bottom of the back panel. Fast also requires a separate adaptor 70 which is used in conjunction with the integral flange 38 in order to secure the label holder on a shelf. Thus, two components are needed.

As evident from the final Office Action, Fast is the primary reference that has been asserted. However, despite the clear disclosure of Fast, the Examiner makes erroneous findings with respect to what Fast discloses and teaches, and then uses those erroneous findings to improperly modify Fast with Nagel.

First, the Examiner erroneously identifies "the back panel" at reference character 18 in Fast et al. See Final Office Action, at page 2, ¶ 2. Indeed, the reference itself specifically identifies reference number 16 as the "back or body panel" rather than panel 18 which the patent Examiner alleges is the back panel of Fast. See Fast, Col. 4, lns. 43-46 ("The merchandising aid 10 includes a label holder portion 15 formed by **a back or body panel 16** and a cover member 18 flexibly secured to each other at hinge or pivot portion 20. (emphasis added)). Thus, the exact language used in the specification of Fast unequivocally contradicts the findings of the Examiner. The disclosure of Fast illustrates that the Examiner has erred by finding the back panel at reference 18 when in fact Fast thus itself identifies panel 16 as the back panel (see also FIG. 3 in Fast). The Examiner has thus erroneously found the cover panel 18 of Fast to be the claimed back panel.

Still further erroneous factual findings are made the final Office Action dated April 29, 2005. At page 2, ¶ 3 the Examiner asserts "Fast et al. does not disclose a label holder with a front panel connected to the back panel along a bottom portion to form a cavity

² While the Examiner points to FIG. 10 as a basis for the rejections, this embodiment is identical to that of FIG. 3 except for a modified version of the extending lower flange 38 as provided. The embodiments and parts thereof are otherwise similar. See Fast, Col. 8, lns. 16-24.

therebetween." This finding is clearly erroneous upon examination of FIG. 3 of Fast where it shows that Fast does indeed include a front panel 18, a cavity 17 and a back panel 16.

Indeed, the specification of Fast specifically teaches and discloses:

"The merchandising aid 10 includes a label holder portion 15 formed by a **back or body panel 16 and a cover member 18 flexibly secured to each other** at a hinge or pivot portion 20. The material from which the merchandising aid is made is not critical to the instant inventive concepts, although commercially such products are commonly co-extruded from plastic materials, with the body panel 16 being formed of an opaque plastic and the cover member 18 being formed of a transparent material to enable passers-by to view information on a **label (not shown) captured in a pocket 17 formed between the front surface of the body panel 16 and the rear surface of the cover member 18.** The cover member 18 can be tipped forwardly in the direction of the arrow 28 to facilitate the insertion or removal of a label. The resilient nature of the hinge 20 will then normally bias the cover member 18 back to its closed position to retain the label in the pocket 17 in a well-known manner."

Fast, column 4, lns. 43-60 (emphasis added). Thus, the finding set forth in the Final Office Action that Nagel doesn't include a front panel and a back panel that form a cavity therebetween for a label is clearly erroneous as well.

What the Examiner has done is attempt to assert that the front panel of Fast is in reality the back panel and there is not a label holding pocket formed between panels in Fast in order to provide superficial reason as to why one would want to modify Fast with Nagel. Considering that the findings of what Fast teaches are clearly erroneous based on the disclosure of Fast, the Board must reverse the obviousness rejections in the Office Action. It is settled law that obviousness rejections cannot be supported based upon erroneous findings as to what a prior art references discloses or teaches. See *In re Lueders*, 111 F.3d 1569, 42 USPQ 2d 1481 (Fed. Cir. 1997) (Board's conclusion of obviousness must be reversed due to erroneous findings of fact relating to the disclosure and teachings of prior art references). The Board need only review the disclosure of Fast to find the findings erroneous.

Because the Examiner's findings as it relates to the teachings of Fast cannot be supported and that a superficial and erroneous reading of Fast has been used as a basis to provide motivation or teaching to modify Fast with Nagel, the asserted modification and suggestion for the same cannot stand. As a result, appellant respectfully requests that the obviousness rejections be withdrawn based upon the erroneous findings of fact regarding the teachings of the references.

B. There is no teaching or suggestion for modifying Fast by Nagel as alleged in the Office Action, particularly considering that such modification would eliminate one of the functional features of Fast.

Based on the erroneous finding that Fast does not disclose a label holder with a front panel connected to the back panel along a bottom portion, the Examiner in the Final Office Action alleges that it would be obvious to substitute the translucent front panel 11 and back panel 12 of Nagel for the sign-holding portion (at reference characters 18, 50 and 52) taught by Fast et al. for the purpose of providing a more securing holding arrangement for a sign. See Final Office Action, page 3, ¶ 1. Thus, the Examiner proposes eliminating the sign holder receiving lip members 50, 52 and cover member 18 of Fast, and instead utilizing the two panels 11, 12 as taught by Nagel. According to the modification, then there would be a total of 3 panels and 2 cavities, including the already existing cavity 17 of Fast for holding a label and a second similar label pocket between panels 11, 12 of Nagel.

Thus, the asserted modification in the Office Action changes the Fast reference from a label holder device which includes the combination of an enclosed pocket 17 for trapping labels and an open pocket³; to a label holder with 2 enclosed label holder pockets defined between a total of 3 panels without an open pocket. This asserted substitution does not make logical sense to one of ordinary skill in the art because the Fast reference already includes an enclosed label holder pocket for securing signs when desired (namely pocket 17 as shown most clearly in FIG. 3 but also see other the other figures including FIG. 10 of Fast which also provides pocket 17). Adding an additional panel in front of the cover panel would tend to obstruct the visibility of labels contained in pocket 17 which would seem counter-intuitive. It is intuitive that multiple layers of plastic diminish viewability.

More importantly, however, is that the asserted modification would eliminate the versatility and function which is claimed to be significant in the Fast reference. Specifically, Fast intentionally provides an enclosed label pocket 17 and an open label pocket (between lips 52, 54) which serves a different function than the enclosed label pocket 17 as indicated at column 5, lns. 7-33. Specifically, in the third paragraph of column 5, the Fast reference makes reference to many different types of uses of an open-style channel formed by the receiving lip member 50, 52. One significant use is for receiving not a label, but a spring

³ See channel defined by lip members 50, 52 which are integrally formed on the cover member.

plastic or metal element which has oppositely-extending edge portions that are adapted to be snappingly engaged into the holder receiving pockets 50, 56 which have a central slit or opening adapted to grippingly engage a plastic or cardboard flag or sign (Fast, Col. 5, Ins. 20-28). Thus, the opening formed between the lip members 50, 52 is critical in Fast for the purposes of being able to receive a snap in element that projects outward from the label holder rather than being self-contained in an enclosed pocket. The asserted modification explicitly defeats stated purpose and functional feature of Fast, while doing no more than providing duplicative structure to pocket 17 which is already provided in the unmodified Fast reference by itself.

The Fast reference also goes on in column 5, ¶ 3 to discuss different forms of sign holders such as disclosed in U.S. Patent Nos. 5,682,698 and 6,163,996 which are enlarged and hang outside of the label holder and could not be contained in a smaller-sized pocket as according to the asserted combination of Fast and Nagel (note the '698 and '996 patents are incorporated by reference in the Fast reference at column 1, Ins. 55-59 and thus form part of the disclosure and teachings of the Fast reference). Again, the asserted modification would prevent such enlarged hanger structures to be used while not providing any additional function because pocket 17 already exists for labels in the unmodified Fast reference.

Accordingly, the asserted modification of Fast by replacing the lips 50, 52 with the solid panel of Nagel would render Fast "unsatisfactory for its intended purpose" as set forth in MPEP § 2143.01. It also improperly "change[s] the principle of operation of a reference" as also set forth in MPEP § 2143.01. See particularly citations to *In re Gordon*, 733 F.2d 900, 221 USPQ 1121 (Fed. Cir. 1984) and *In re Ratti* 270 F.2d 810, 123 USPQ 349 (CCPA 1959) in MPEP § 2143.01.

Additionally, the above evidences the alleged teaching or suggestion set forth in the Office Action does not come from the references themselves because the Fast reference already teaches an enclosed pocket 17 for receiving a label between two panels (see Fast, column 4, Ins. 40-60). There is no reason or suggestion that a duplicative structure would necessarily be advantageous and desirable. If one were to want to more securely procure a label in the Fast reference, it would not use structures 52, 54, but rather, one skilled in the art would simply use the label pocket 17 which is already provided in Fast. Eliminating the

versatility and additional features and functions provided by lip members 52, 54 of Fast with the asserted modification of Nagel simply cannot be supported and is nothing more than the improper use of hindsight to reconstruct Applicant's invention using the teachings of Applicant's disclosure as a blueprint to formulate obviousness rejections.

As such, the asserted obviousness rejection additionally violates the well established principle that the “teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in applicant’s disclosure.” MPEP § 2143 citing *In Re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991). Indeed, the lack of any reference to the prior art or the specific understanding or principle in the art for the alleged teaching in the office action evidences this deficiency . When the U.S. Patent & Trademark Office “[does] not explain the specific understanding or principle within the knowledge of a skilled artisan that would motivate one with no knowledge of [Applicant’s] invention to make the combination, this court infers that the examiner selected these references with the assistance of hindsight. This court forbids the use of hindsight in the selection of references that comprise the case of obviousness.” *In re Rouffet*, 149 F.3d 1350, 1358, 47 U.S.P.Q.2D 1453, 1458 (Fed. Cir. 1998) (citations omitted); see also *In re Gorman*, 933 F.2d 982, 986, 18 U.S.P.Q.2D 1885, 1888 (Fed. Cir. 1991). “To prevent the use of hindsight based on the invention to defeat patentability of the invention, this [the Federal Circuit] requires the examiner to show a motivation to combine the references that create the case of obviousness. In other words, the examiner must show reasons that the skilled artisan, confronted with the same problems as the inventor and with no knowledge of the claimed invention, would select the elements from the cited prior art references for combination in the manner claimed.” *In re Rouffet*, 149 F.3d 1350, 1357, 47 U.S.P.Q.2D 1453, 1459 (Fed. Cir. 1998).

C. The asserted modification of making the back panel 12 of Nagel opaque (which is substituted for panel 18 of Fast) would render inoperable the label pocket 17 of Fast and therefore the rejections of claim 8 cannot be supported in view of MPEP § 2143.01.

According to the Examiner's logic cited at page 3, ¶ 1 of the final Office Action, after front and back panels 11 and 12 are substituted for the front panel of Fast 18 (with lip member 50, 52), the Examiner takes the further position that it would be obvious to make the

back member (equivalent to structure 18 of Fast) of an opaque PVC material. However, what the Examiner is effectively asserting is that the intermediate panel in the modified device would be opaque (considering that Fast already discloses a back panel 16). However, this would defeat the explicit purpose and function of the label holding pocket 17 of Fast as taught at column 4, lns. 40-60. Indeed, Fast discloses that "the cover member 18 is formed of a transparent material to enable passers-by to view information on a label captured in pocket 17." (See column 4, lns. 50-53). By substituting the cover member 18 of Fast with the back panel 12 of Nagel and then making panel 12 opaque as opposed to transparent, that would defeat enablement of allowing viewers to see information contained in the label holding pocket 17 of Fast. Accordingly, this would violate the established precedent set forth in MPEP § 2143.01 that "the proposed modification cannot render the prior art unsatisfactory for its intended purpose." For this additional reason, Applicant respectfully requests the obviousness rejections of claim 8 to be withdrawn.

D. The prior art references when combined fail to teach the limitation of an upward retaining flange engaging the top support flange of said shelf as recited in claim 11.

Claim 11 is a combination claim directed at the combination of a label holder and a shelf and is broader in certain respects to claim 1 (which is directed at a label holder only), but narrower in the respect that it is claimed in combination with a C-channel shelf, in which the inwardly-curving panel (e.g. C-channel) includes lower and top support flanges.

The Examiner has asserted that the combination of Nagel and Fast et al. include all of the limitations of claim 11. However, this is not the case. Claim 11 recites that the shelf clip portion comprises "an upward retaining flange engaging the top support flange of said shelf." Although there is no C-channel nor apparent top support flange shown in the shelf of Fast, the Examiner does note that Fast discusses the potential for use of its device with C-channels as described in Col. 9, ¶ 1. However, there is no description on how that is accomplished. Thus, any modifications of the teachings of Fast to reach the above-limitation would necessarily be done with the improper use of hindsight.

However, even with the asserted combination, there would not be "an upward retaining flange engaging the top support flange of said shelf." With reference to FIG. 3 of Fast, the upper flange 32 projects forwardly and would be directed away from the upper

In re Appln. of: Michael Brinkman et al.
Application No.: 10/743,215

flange; thus it would not engage it (this is so that it can receive a separate adapter 70) and the Examiner has not proposed changing this separate mounting means. It is noted, however, that this flange 32 is not even what is considered to be the back panel according to the obviousness rejection advanced.

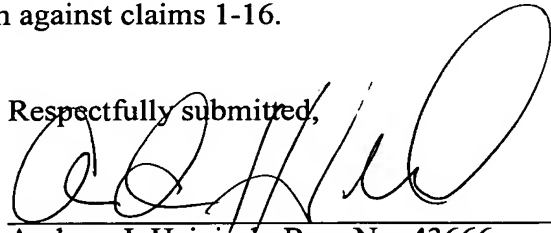
Indeed, the Examiner has instead asserted that panel 18 is the back panel in the Fast reference which includes structure generally indicated at 50 which again projects forwardly and would not come into contact with the upper flange of a C-channel shelf. Indeed, structure 50 provides a lever or tab means so as to pivot the panel member relative to hinge 20 and thereby open label pocket 17 in Fast. Thus, this also could not be the structure which is equivalent to "the upward retaining flange engaging the top support flange of said shelf" as recited in claim 11. The Examiner has not asserted that Nagel cures any of these deficiencies, and in fact it does not according to the alleged combination set forth in the Office Action.

Accordingly, the rejections of claim 11 cannot stand, and Applicant respectfully requests the obviousness rejections of claim 11 and its dependents be withdrawn for this additional reason.

Conclusion

In view of the foregoing arguments, Appellants respectfully request the obviousness rejections under 35 USC § 103 be withdrawn against claims 1-16.

Respectfully submitted,



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Date: November 16, 2005

Claims Appendix

1. A label holder for attachment to a shelf, the label holder comprising:
a front panel;
a back panel connected to the front panel along a bottom portion thereof, said front panel and said back panel forming a cavity therebetween;
a top flange proximate a top portion of the back panel; and
a shelf clip portion joined to the top flange and spaced rearward of the back panel, said shelf clip portion comprising an upward retaining flange for engaging the shelf and a downward angled portion terminating in a catch flange and a curved resilient hinge portion extended from the downward angled portion and wrapping around the catch flange to form an upward flange.
2. The label holder of claim 1 wherein said retaining flange pivots in response to upward pivoting movement of said back panel to secure said retaining flange against the shelf.
3. The label holder of claim 1 wherein said shelf clip portion provides resilient clamping onto the shelf, said catch flange configured to engage a lower shelf channel flange.
4. The label holder of claim 1 wherein said top flange is a protective flange extending forward from the back panel and having a downward depending edge.
5. The label holder of claim 1 wherein the downward angled engaging portion is angled at approximately 20 degrees from vertical.
6. The label holder of claim 1 wherein the label holder is constructed of one or more of polyvinyl chloride, butyrate, provista and acrylonitrile butadiene styrene (ABS).
7. The label holder of claim 1 wherein the label holder is translucent or partially translucent.
8. The label holder of claim 7 wherein the back panel is opaque, the label holder constructed as co-extruded polyvinyl chloride, butyrate, provista or acrylonitrile butadiene styrene (ABS).
9. The label holder of claim 1 wherein a height of the label holder is approximately between 1 inch and 1 ½ inches.

10. The label holder of claim 1 wherein a height of the label holder is approximately between 3 inches and 4 inches.

11. A label holder mounted on a C-channel shelf having a top support flange, an inwardly curving panel and a lower support flange, the label holder comprising:

a front translucent panel;

a back panel connected to the front panel along a bottom portion thereof, said front panel and said back panel forming a cavity there between; and

a shelf clip portion joined to a top portion of the back panel, the shelf clip portion comprising an upward retaining flange engaging the top support flange of said shelf and a downward angled portion terminating in a catch flange secured by the lower support flange of said shelf and a curved resilient hinge portion attached to the downward angled portion, the curved resilient hinge portion being wrapped around the lower support flange and engaging a back side of the inwardly curving panel.

12. The label holder of claim 11 wherein said retaining flange pivots in response to upward rotational movement of said back panel to secure said retaining flange against the shelf.

13. The label holder of claim 11 wherein the label holder is constructed of one or more of polyvinyl chloride, butyrate, provista and acrylonitrile butadiene styrene (ABS).

14. The label holder of claim 11 wherein said label holder has a height of approximately 1" and 1 ½ ".

15. The label holder of claim 11 further comprising a protective flange extending forwardly from the back panel with a downward depending edge.

16. The label holder of claim 11 wherein the downward angled engaging portion is angled at approximately 20 degrees from vertical.

In re Appln. of Michael Brinkman et al.
Application No. 10/743,215

Evidence Appendix

None.

In re Appln. of Michael Brinkman et al.
Application No. 10/743,215

Related Proceedings Appendix

None.